(4)

No. 87-1869

In the Supreme Court of the United States

OCTOBER TERM, 1988

ARCTIC SLOPE REGIONAL CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MOTION FOR LEAVE TO FILE BRIEF FOR THE ALASKA FEDERATION OF NATIVES AS AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF FOR THE ALASKA FEDERATION OF NATIVES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 36 of the Rules of this Court, the Alaska Federation of Natives ("AFN") requests leave to file the accompanying brief as amicus curiae in support of petitioner. The attorneys for petitioner have consented to the filing of this brief. Consent has not been received from the attorneys for respondents.

The AFN is a non-profit corporation incorporated under the laws of the State of Alaska. The AFN represents all Alaska Natives and served as their advocate during the passage of the Alaska Native Claims Settle-

ment Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). The outcome of this litigation will have a direct effect on all Alaska Natives represented by the AFN.

Respectfully submitted.

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JULY 1988

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BRIEF OF THE ALASKA FEDERATION OF NATIVES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Alaska Federation of Natives ("AFN") is a non-profit corporation incorporated under the laws of the State of Alaska. The AFN represents all Alaska Natives and served as their advocate during the passage of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ("ANCSA"). Because the decision below directly harms the economic interests of all Alaska Natives, the AFN urges that the Court grant review.

SUMMARY OF ARGUMENT

The unprecedented decision below inflicts irreparable injury on the Alaska Natives and interferes with the comprehensive settlement of Alaska Native Claims enacted by Congress. The court below departed from consistent administrative and judicial precedent by denying Arctic the right to a hearing to determine the legality of Trans Alaska Pipeline System ("TAPS") rates. The court authorized the Federal Energy Regulatory Commission ("FERC") to dismiss Arctic's complaint despite Arctic's admitted present injury. The Interstate Commerce Act, however, provides only prospective relief for injuries to non-shippers. Therefore, postponement of Arctic's right to a remedy denies it *any* relief from its present injury. The decision below frustrates major remedial provisions of the Interstate Commerce Act and impairs the interests of other Regional Corporations involved in the Alaska oil industry.

ARGUMENT

THE DECISION BELOW WARRANTS REVIEW BECAUSE IT IS IN CONFLICT WITH SETTLED LAW AND INFLICTS IRREPARABLE INJURY ON ALL ALASKA NATIVES.

I. THE DECISION BELOW INFLICTS IRREPARABLE INJURY ON ARCTIC AND ALL ALASKA NATIVES.

By denying petitioner Arctic the right to seek lawful TAPS rates, the decision below injures economic rights of Alaska Natives that are at the heart of the Alaska Native Claims Settlement Act. With ANCSA, Congress made grants to the Alaska Natives of cash and lands as "compensation for the extinguishment of [aboriginal] claims to [Alaskan] land." 43 U.S.C. § 1626(a). The land grants were intended to serve "as a form of capital for economic development," H.R. Rep. No. 523, 92d Cong., 1st Sess. 5 (1971), and Congress recognized that most

land selected by the Natives pursuant to ANCSA "[would] be selected for its economic potential." *Id.*

Arctic is one of thirteen Regional Corporations established to administer the ANCSA grants and owns some 4.5 million acres of land on the Alaska North Slope which contain proven, probable and possible oil reserves. High TAPS rates directly reduce the value of these lands and the income that they generate. *See Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 635 n.6 (1978) ("*TAPS I*").

All Alaska Natives share in the injury caused Arctic by excessive TAPS rates. Congress intended "that all Natives may benefit equally from any minerals discovered within a particular region," H.R. Rep. No. 523, 92d Cong., 1st Sess. 6 (1971), and pursuant to 43 U.S.C. § 1606(i), "[s]eventy per centum of all revenues received by [Arctic] from . . . subsurface estate patented to it pursuant to [ANCSA] shall be divided annually by [Arctic] among all twelve Regional Corporations . . . according to the number of Natives enrolled in each region . . . ." By statute, revenues received by the Regional Corporations are distributed among the approximately two hundred Village Corporations and eighty thousand Native shareholders to ameliorate "the extreme poverty and underprivileged status of the Natives generally" and to provide "adequate resources to permit the Natives to help themselves economically." H.R. Rep. No. 523, 92d Cong., 1st Sess. 5-6 (1971). *See* 43 U.S.C. § 1606(j). Alaska Natives lose current revenue because of the decision below: Their share of revenue from Arctic's lands is diminished, and their own efforts to develop Alaska oil are endangered. As has Arctic, other Regional Corporations will have direct interests in TAPS rates before they will become shippers. The decision below is precedent that they cannot challenge excessive TAPS rates that injure them.

The court of appeals acknowledged that Arctic is harmed if TAPS rates are excessive, Pet. App. at 10a n.10, and found that the impact of TAPS rates on Arctic's current interests was "assuredly real." *Id.* at 18a n.20. Nonetheless, the court concluded that FERC could refuse to provide Arctic a hearing on the merits until "the impact of TAPS rates upon it is more concrete and substantial," *id.* at 19a, and found it "appropriate" that FERC "preserv[e Arctic's] possible future challenges for a riper moment." *Id.* at 17a.

The court's decision ignored the realities of TAPS economics. Alaska almost certainly contains the largest remaining American petroleum reserves, and oil companies today are exploring the Alaska North Slope to determine the location and the extent of those reserves. Bidders for North Slope leases seek the rights to explore and to develop what oil reserves they find: If tracts appear likely to produce oil in quantity and at a profit, they will pay substantial bonuses to enter leases and agree to substantial rental payments for leasing sufficient surface estate to allow drilling and exploration.

TAPS charges directly diminish profitability and the amounts Arctic can get for its leases. Unless a potential bidder is a parent or affiliate of a TAPS owner, every dollar that must be paid to transport a barrel of oil to market through TAPS must be subtracted from the profit that can be made on that barrel of oil. *See TAPS I*, 436 U.S. at 635 n.6. Moreover, TAPS rates are vastly higher than those of other domestic oil pipelines. *See Trans Alaska Pipeline System*, 21 F.E.R.C. (CCH) ¶ 61,092 at 61,285 (1982). They therefore constitute a major portion of a producer's costs and have a profound impact on the profitability of oil recovery.

As Arctic demonstrates, *see* Pet. at 4-5, high TAPS rates reduce the current income from its lands, and can render unprofitable some fields that would be productive

if their oil could be shipped to market at reasonable rates. If TAPS rates are excessive, Arctic will receive less for its rights regardless of whether oil ultimately is produced or not.

Arctic is the party most grievously injured by high TAPS rates and the only party realistically likely to challenge those rates. The major shippers of North Slope oil are parent companies of the TAPS owners, and so they recover excessive TAPS charges through the high profits of their subsidiaries. *See TAPS I*, 436 U.S. at 644. The large oil companies simply have no interest in low TAPS rates, because the weight of such rates falls on independent producers and the public:

> [N]o shipper of oil protested the TAPS rates. Instead, as one might predict from experience under the Hepburn Act . . . , only the public perceives that it will be injured by the proposed TAPS rates and has objected to them. . . . Therefore, in the absence of suspension authority, unreasonable initial rates—both generally and in these cases—like unreasonable increases in existing rates, will almost certainly be passed along to "a prior producer or . . . to the ultimate consumer."

Id. (citation omitted). The Natives must rely on their own efforts or FERC's initiative for protection against unlawful rates. But FERC has strenuously avoided addressing the legality of TAPS rates, and the decision of the court of appeals blocks the Natives' own efforts to assert their rights. By holding that the possibility of future relief was an adequate remedy for Arctic's injury, the court below condemned Arctic—and all Alaska Natives—to irreparable injury.

II. THE DECISION BELOW SHOULD BE REVIEWED BECAUSE IT ENDANGERS THE RIGHTS OF ALL NON-SHIPPERS TO INTERSTATE COMMERCE ACT REMEDIES.

The settlement approved by FERC and the court below addressed the private concerns of the settling litigants, but did not fulfill the "Commission's essential task . . . to establish and maintain reasonable charges and proper rate relationships." *United States* v. *Chesapeake & Ohio Ry. Co.*, 426 U.S. 500, 513 (1976) (*"Chessie"*) (quoting 1 I. Sharfman, *The Interstate Commerce Commission* 59 (1931)). Its terms were shaped by the fact that Alaska, entitled to royalties on oil already shipped, had a strong claim for refunds.[1] The settlement ignored Arctic's interests, those of the Alaska Natives, and those of all non-shippers. FERC dismissed Arctic's complaint solely on the erroneous ground that Arctic was not aggrieved. When the court of appeals affirmed FERC despite rejecting that rationale, it created unprecedented doctrine inconsistent with the remedial scheme established by the Interstate Commerce Act.

The AFN joins Arctic in its position that the decision below was inconsistent with the Interstate Commerce Act, FERC regulations, and the Due Process Clause. The decision resulted in an unlawful denial of an aggrieved party's right to a hearing on the legality of rates.

The court of appeals authorized FERC to consider the extent—rather than the existence—of an aggrieved

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[1] Alaska agreed not to challenge rates generated by a methodology that established rates far higher than those generated by the methodology established by the Initial Decision in the administrative proceedings. *See Trans Alaska Pipeline System*, 10 F.E.R.C. (CCH) ¶ 63,026 (1980). It agreed that three quarters of the contested cost of construction would be allowed in the rate base, and that the owners could recover the remaining quarter through depreciation. In return, Alaska received several hundred million dollars for *past* overcharges and some thirty-five million dollars as reimbursement for its litigation expenses.

party's injury, *see* Pet. App. at 10a n.10, and then encouraged FERC to trivialize Arctic's injuries by comparing them to those suffered by shippers. *See id.* at 16a ("Here, Arctic is, for starters, not even a current rate payer"); *id.* at 19a (impact of TAPS settlement on Arctic was less severe and direct than on a shipper). The court thus gutted the remedial scheme established by the Interstate Commerce Act: The Act grants an aggrieved party the right to a hearing, but the decision below denies that right and substitutes dependence on administrative discretion.

The Interstate Commerce Act has never limited its remedial provisions to shippers. Section 13 of the original Act, containing the standing provisions for proceedings before the Interstate Commerce Commission, authorized "any person" to file a complaint with the Commission, *see* 49 U.S.C. § 13(1), and provided that no complaint could be dismissed "because of the absence of direct damage to the complainant." 49 U.S.C. § 13(2). *See also ICC* v. *Baird*, 194 U.S. 25, 39 (1904).

Non-shippers are harmed until an excessive rate is declared unlawful, and their injuries cannot be remedied by reparations. Congress authorized the prescription of maximum rates and the suspension of proposed rates, *see TAPS I*, 436 U.S. at 639-42, "to protect the public from the irreparable harm resulting in unjustified increases in transportation costs. . . ." *Chessie*, 426 U.S. at 513.[2] The Act thus supplements its damages remedy for shippers, *see* 49 U.S.C. § 16(1), with enhanced prospective relief to protect the broader class of persons who suffer if rates are excessive.

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[2] At the same time Congress enlarged the Commission's authority, it extended coverage of the Act to oil pipelines. *See Farmers Union Cent. Exchange, Inc.* v. *FERC*, 734 F.2d 1486, 1504 (D.C. Cir.), *cert. denied*, 469 U.S. 1034 (1984).

The decision below is at loggerheads with the evident purpose of the Act. The decision withholds the right to prospective relief from non-shippers—the very class which must have prospective relief to have any remedy at all—and grants it only to shippers—the one class which can gain at least some relief through damages.

CONCLUSION

The Alaska Federation of Natives urges the Court to grant certiorari and reverse the decision below.

Respectfully submitted.

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